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Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1952.

No. 588

THE WARNER & SWASEY COMPANY,
Petitioner,

v.

WAR CONTRACTS PRICE ADJUSTMENT BOARD, and MAURICE HIRSCH, EDWIN H. BARKLEY, JOHN R. PAULL, H. C. MAULL, JR., GEORGE P. LUCE and NORMAN L. BURTON, Members Thereof, and the UNITED STATES

and

RECONSTRUCTION FINANCE CORPORATION,
Respondents.

PETITION FOR WRIT OF CERTIORARI
To The United States Court of Appeals for The District of Columbia Circuit.

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RECONSTRUCTION FINANCE CORPORATION,

Respondents.

PETITION FOR WRIT OF CERTIORARI To The United States Court of Appeals for The District of Columbia Circuit.

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in the above entitled case on November 20, 1952.

OPINIONS BELOW.

The memorandum opinion of the Tax Court (Joint App. p. 244) is unreported. The opinion of the United States Court of Appeals for the District of Columbia Circuit has not yet been officially reported. It appears in the Joint Appendix (p. 271).

JURISDICTION.

The judgment of the United States Court of Appeals for the District of Columbia Circuit was entered on November 20, 1952 (Joint App. p. 274). The jurisdiction of this Court is invoked under Title 28, USC §§ 1254 and 2101.

QUESTIONS PRESENTED.

(1) Whether the retroactive application of the July 1, 1943 amendment to the Renegotiation Act of 1942, as interpreted by the Court of Appeals for the District of Columbia Circuit, to contracts and subcontracts fully performed, discharged, and completely paid for prior to the enactment of the amendment deprives petitioner of its property without compensation and without due process of law in violation of the Fifth Amendment to the Constitution of the United States; and

(2) Whether the July 1, 1943 amendment, properly construed, requires such retroactive application.

STATUTES INVOLVED.

The pertinent statutory provisions are printed in Appendix A, *infra*, p. 19 *et seq.*

STATEMENT OF MATTER INVOLVED.

This Court has been called upon many times in its history to determine the extent to which Congress may enact retroactive legislation consistently with the limitations of the Fifth Amendment. The area of permissible retroactivity has been particularly difficult to fix in cases involving contract rights. This is such a case. It raises for decision the constitutionality of a more retroactive application of statute to contract than has ever been sanctioned by this Court.

Most recently the constitutional issue of retroactivity was presented to this Court in the context of the Renegotiation Act of 1942. In *Lichter v. United States,* 334 U. S. 742 (1948), this Court held the Renegotiation Act valid as applied to contracts which had been negotiated and signed before its enactment, but implied that the saving factor was that the contracts had not been fully paid for and discharged at the time of the enactment of the statute.

The constitutional issue suggested in the opinion in the *Lichter* case is now brought squarely before the Court by this petition. Involved here are two identical cases[1] calling for determination of the validity of compulsory renegotiation of contracts fully performed, discharged and paid for prior to the enactment of the statute interpreted as authorizing their renegotiation.

The issue arises from the cases in this way.

The original Renegotiation Act of 1942 gave to the Secretary of War, the Secretary of Navy and the Maritime Commission the right to renegotiate contracts with their respective departments, and subcontracts thereunder, whenever in their opinion excessive profits would have been realized from such contracts or subcontracts.[2] No such power was given to Defense Plant Corporation or any other subsidiary of Reconstruction Finance Corporation.

Section 403(c) of the original statute provided:

> "* * * This subsection shall be applicable to all contracts and subcontracts hereafter made and to all contracts and subcontracts heretofore made, whether or not such contracts or subcontracts contain a renegotiation or recapture clause provided *that final pay-*

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[1] Consolidated for hearing (Joint App. p. 270), and in which one judgment was entered by the Court of Appeals (Joint App. p. 274).

[2] Sixth Supplemental National Defense Appropriation Act of 1942, § 403, 56 Stat. 226, 245.

ment pursuant to such contract or subcontract has not been made prior to the date of enactment of this act." [3]

The date of enactment was April 28, 1942.

On October 21, 1942 the statute was amended to add the Treasury Department to the departments given the power to require renegotiation.[4]

Not until July 1, 1943, more than a year after the Renegotiation Act was first passed, did the Congress amend the act to extend to Defense Plant Corporation and other subsidiaries of Reconstruction Finance Corporation the power to require renegotiation.[5]

Petitioner, a manufacturer of turret lathes and equipment, entered into a variety of wartime contracts with

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[3] Emphasis throughout is supplied unless otherwise indicated.

[4] Revenue Act of 1942, Title VIII, § 801, 56 Stat. 798, 982.

[5] The grant appears in the lengthy Military Appropriation Act of 1944, 57 Stat. 347, which amended § 403 as follows:

"Provided further, That clauses (1) and (2) of subsection (a) of section 403 of the Sixth Supplemental National Defense Appropriation Act, 1942, as amended, are amended to read as follows:

" 'Sec. 403 (a) For the purposes of this section—

"1. The term 'Department' means the War Department, the Navy Department, the Treasury Department, the Maritime Commission, Defense Plant Corporation, Metals Reserve Company, Defense Supplies Corporation, and Rubber Reserve Company, respectively.

"2. In the case of the Maritime Commission, the term 'Secretary' means the Chairman of such Commission, and in the case of Defense Plant Corporation, Metals Reserve Company, Defense Supplies Corporation, and Rubber Reserve Company, the term 'Secretary' means the board of directors of the appropriate corporation.

"Provided further, That section 403 of the Sixth Supplemental National Defense Appropriation Act, 1942, as amended, is further amended by adding at the end thereof the following subsection:

" '(k) All the provisions of this section shall be construed to apply to Defense Plant Corporation, Metal Reserve Company, Defense Supplies Corporation, and Rubber Reserve Company.' "

Defense Plant Corporation, and subcontracts under contracts with it. Certain of these contracts and subcontracts are in issue here. The critical factor which distinguishes these particular contracts is the element of time. They had not been fully performed on April 28, 1942, the date of enactment of the original Renegotiation Act, but had been fully performed, executed, discharged and paid for before July 1, 1943, the date when the Renegotiation Act was amended to extend the renegotiation power to Defence Plant Corporation. The precise issue here involved is whether these contracts, non-existent at the date of the amendment, might be subjected constitutionally to retrospective renegotiation.

Despite Petitioner's protests these contracts were subjected to renegotiation by the RFC Price Adjustment Board. On appeal, the Tax Court and the Court of Appeals for the District of Columbia Circuit held, contrary to the position of Petitioner, that the July 1, 1943 amendment must be interpreted to apply retroactively to contracts fully performed and paid for prior to the enactment of the amendment and that, so interpreted, the statute was constitutional.

The Court of Appeals rendered no full opinion upon the merits of petitioner's statutory and constitutional contentions. The court did no more than cite its earlier decisions in *Blanchard Machine Co. v. Reconstruction Finance Corporation Price Adjustment Board,* 177 F. 2d 727 (C. A. D. C. 1949), *cert. den.,* 339 U. S. 912 (1949), and *Eastern Machinery Co. v. Undersecretary of War,* 182 F. 2d 99 (C. A. D. C. 1950), which in turn had been decided. insofar as the constitutional question was involved, solely upon the authority of *Howell Electric Motors Co. v. United States,* 172 F. 2d 953 (C. A. 6, 1949), without further independent consideration of the constitutional question. The court in the present case stated only that "it was not persuaded to

reexamine these questions, twice decided" by it (Joint App. p. 273).

Review is sought here of the single judgment of the Court of Appeals for the District of Columbia (Joint App. p. 274) in these two cases.

STIPULATIONS AND FINDINGS.

The facts giving rise to the issue in the cases at bar are simple, and are stipulated.

In Docket No. 622-R in the Tax Court, Docket No. 11423 in the Court of Appeals, relating to the year 1942, it was stipulated between the parties that the petitioner is an Ohio corporation engaged in the manufacture of turret lathes and equipment, and that it made sales during the year 1942 under Defense Plant Corporation contracts and subcontracts (Joint App. p. 95).

On August 26, 1946, R. F. C. Price Adjustment Board entered its unilateral determination and order that, of the profits realized by the petitioner during 1942 under its Defense Plant Corporation contracts and subcontracts, $5,497,833 represented excessive profits (Joint App. p. 96).

On November 21, 1946, petitioner appealed to the Tax Court (Joint App. p. 49) raising the questions (Joint App. pp. 49, 52) which are sought to be reviewed in this Court.

In the Tax Court, it was stipulated that, if the Renegotiation Act is applicable to and constitutionally subjects to renegotiation "all of petitioner's Defense Plant Corporation contracts and subcontracts (with respect to profits received or accrued by petitioner therefrom during the fiscal year) which were made and fully performed by petitioner prior to July 1, 1943, and under which final payment was made to petitioner after April 27, 1942, and before July 1, 1943," that portion of petitioner's profits

realized thereunder which must be eliminated as excessive under the Renegotiation Act is $5,836,450.87, before application of the tax credit pursuant to I. R. C. § 3806, while, if the contrary is true, the portion to be eliminated as excessive is only $76,697.35 (Joint App. p. 97).

In Docket No. 570-R in the Tax Court, Docket No. 11,422 in the Court of Appeals, relating to the year 1943, on January 30, 1946, R. F. C. Price Adjustment Board, an agency of Reconstruction Finance Corporation, made a unilateral determination and order that, of the profits realized by the petitioner during 1943 under its Defense Plant Corporation contracts and subcontracts, $6,500,000 represented excessive profits (Joint App. pp. 91, 92). On May 28, 1946, this became the determination of War Contracts Price Adjustment Board (Joint App. p. 92), the respondent in that case in the Tax Court and the Court of Appeals.

Petitioner appealed to the Tax Court on August 14, 1946 (Joint App. p. 9), raising, *inter alia,* the questions presented to this Court (Joint App. pp. 9, 13).

In the Tax Court the parties stipulated substantially the same type of facts as in the 1942 case (Joint App. p. 91). It was agreed that $6,836,471.86 of petitioner's profits for 1943 from Defense Plant Corporation contracts, and subcontracts thereunder, completed prior to July 1, 1943, and finally paid for between April 27, 1942 and July 1, 1943, must be eliminated as excessive if the Renegotiation Act was applicable to such contracts and subcontracts and constitutionally subjected the profits therefrom to renegotiation, while $4,201,088.82 must be eliminated if this were not the case (Joint App., p. 93).

The Tax Court held the July 1, 1943 amendment retroactive and constitutional (Joint App. p. 244) and entered judgment against petitioner in the stipulated amounts

(Joint App., pp. 248, 249). The Court of Appeals affirmed the decisions of the Tax Court (Joint App., p. 274).

SPECIFICATION OF ERRORS TO BE URGED.

The Court of Appeals erred:

(1) In holding that retroactive application of the July 1, 1943 amendment to the Renegotiation Act of 1942 to petitioner's Defense Plant Corporation contracts and subcontracts, fully performed and paid for prior to the enactment of the amendment, did not deprive petitioner of its property without compensation and without due process of law in violation of the Fifth Amendment to the Constitution of the United States.

(2) In interpreting the July 1, 1943 amendment to the Renegotiation Act of 1942 as retroactively applicable to petitioner's Defense Plant Corporation contracts and subcontracts, fully performed and paid for prior to the enactment of the amendment.

REASONS FOR GRANTING THE WRIT.

The constitutional question presented by this petition is important.

As in the case of other broad constitutional liberties, the right of the citizen to be protected against retroactive deprivation of his property can be outlined only approximately. But the line must be drawn somewhere and at some point a balance must be struck between the competing forces of private rights and national interest.

In the field of contract rights, it is apparent that this line might be drawn at a number of places. The range of choice lies between a constitutional rule which would permit the Congress to effect no contract rights retroactively,

and a rule which would set no limitation upon legislative disruption of settled property rights. The former is impractical; the latter is unthinkable. Clearly, the Congress may in some respect alter contractual rights retrospectively in the exercise of its federal jurisdiction. And it is equally apparent that at some point ordinary doctrines of repose and standards of judicial fairness require that vested rights be left vested and that contract rights move under the protection of the Fifth Amendment.

The question is where to stop.

A. The Lichter Case.

In *Lichter v. United States*, 334 U. S. 742 (1948), *supra*, the Court did not stop at the point which would make all retroactivity unconstitutional in the contract field. One of the issues in the *Lichter* case was the validity of the Renegotiation Act of 1942 as applied to contracts entered into prior to the date of its enactment, but still partially executory and unpaid for on that date. This Court held the statute constitutional as applied in those circumstances. But, carefully limiting its decision to the facts of the case, and implying that the borders of constitutionality might have been reached, the Court carefully emphasized the fact that final payment had not been made. It said:

> "* * * We therefore do not have before us an issue as to the recovery of excessive profits on any contract made directly with the Government *nor on any subcontract upon which final payment had been made before April 28, 1942*, although relating to war goods made or services performed after the declaration of war, December 8, 1941. * * *
>
> "We uphold the right of the Government to recover excessive profits on each of the contracts before us. This right exists as to such excessive profits whether they arose from contracts made before or

> after the passage of the Act. A contract is equally a war contract in either event and, *if uncompleted to the extent that the final payment has not yet been made, the recovery of excessive profits derived from it may be authorized* as has been done here." (334 U. S. 742, 788, 789.)

And it is significant that the only case cited by this Court in support of its holding was *Dayton Goose Creek R. R. Co. v. United States*, 263 U. S. 456 (1923), a decision dealing with prospective legislation only.[6]

This language and citation in the *Lichter* case reflect the careful limitation of the holding. But they also point to a practical and fair line at which to mark out the area of permissible constitutional retroactivity in the contract renegotiation field. The point of full execution and payment—legal discharge—of the contracts sets a criterion which can be easily isolated and which accommodates the competing forces involved.

Other possibilities exist, of course. The constitutional rule might be said to be that a "reasonable" time must pass after full performance and payment before the contract rights come to enjoy constitutional protection. On the other side of the line perhaps an effort could be made to distinguish between contracts which, while still partially executory, are at varying stages of execution. But the administrative difficulties inherent in both of these rules would make them no rule at all.

The *Lichter* decision passed the first point at which it would have been administratively feasible to limit retro-

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[6] The holding was that legislation providing that railroads should in the future hold income in excess of a fair return as trustee for the United States did not constitute the taking of private property, since the legislation declared the carrier to be only a trustee of the excess and, therefore, "the excess never become its property and it accepts custody of a product of all the rates with this understanding." (p. 484.)

active legislation when it held that the Renegotiation Act could apply to contracts already signed so long as they remain partially executory. The only other check point which is practically available is that at which there has been full performance of the obligations of both parties to the contract—the point at which the contract is discharged and paid for.

It is for this reason that petitioner presses these cases upon the Court. The lower court has adopted by reference the opinion of the Court of Appeals for the Sixth Circuit in *Howell Electric Motors Co. v. United States, supra,* holding:

> "While in the *Lichter* case the payments had not been fully made, as here, the contracts had been otherwise fully performed. We think the mere circumstance that the contractor here has received full remuneration of the transactions involved is a distinction without substance * * *. If Congress, within the exercise of its war powers, may reach back and alter war contracts, which is unquestionably true, *Lichter v. United States, supra,* it may also provide for the recovery of payments made under such contracts * * *." 172 F. 2d 953, 954 (C. A. 6, 1949).

The *Lichter* case is thus considered by two Courts of Appeals to be authority for the proposition that so long as the Congress acts in the exercise of its war powers, there are no constitutional limits upon retroactive legislation—a far-reaching doctrine, especially in the case of a long war. In petitioner's view, the lower courts in this respect have completely misconstrued the *Lichter* case and have failed entirely to recognize the importance of the step being taken.

A state of war does not suspend constitutional guarantees. And only superficially do the circumstances in the present case appear close to the circumstances in the *Lichter* case. The step which takes one over the edge of

a cliff need not be a long one. The *Lichter* decision remained within the bounds of an ascertainable limiting point beyond which constitutional doctrine did not reach —the point at which the contract was discharged and the transaction fully closed. But the present decision moves, almost casually, beyond this limit and, having done so, moves into an uncharted area in which no limits may be seen or defined.

B. Other Constitutional Decisions.

The lower court has not only decided an entirely new constitutional issue in the renegotiation field and extended constitutional doctrine far beyond the scope of the *Lichter* decision, but also it has done so without the support or authority of any other decision of this Court dealing with constitutional retroactivity.

Other than the *Lichter* case the only basis advanced by the Court of Appeals for the Sixth Circuit for its decision in the *Howell* case, and adopted by the Court of Appeals for the District of Columbia Circuit in the present case, is as follows:

> "It is settled law that the retroactive reach of a statute may constitutionally cover property rights that have vested, Louisville & Nashville R. Co. v. Mottley, 219 U. S. 467, 31 S. Ct. 265, 55 L. Ed. 297, 34 L. R. A., N. S. 671, and also may cover payments already received. Welch v. Henry, 305 U. S. 134, 59 S. Ct. 121, 83 L. Ed. 87, 118 A. L. R. 1142; United States v. Hudson, 299 U. S. 498, 57 S. Ct. 309, 81 L. Ed. 370. None of these cases involved the exercise of the war power of Congress; but if, apart from the war emergency, legislation repealing an exemption applicable to income already received was valid, as in the Welch case, clearly Congress has not less power in dealing with the

problem of recapturing excess war profits." (172 F. 2d 953, 954.)

None of the authorities cited supports the proposition in question. Full review of the particulars of the holdings in these cases is not appropriate here but the significant differences between them and the present situation may be briefly noted.

In *Louisville & Nashville R. R. Co. v. Mottley,* 219 U. S. 467 (1911), this Court held that a contract for free railroad passes, made illegal by subsequent legislation, could not be further enforced *in the future.*

This is a far cry from the present situation, in which the government has been held to have the right to change the terms of a discharged contract and to create for itself a wholly new cause of action against petitioner, based on the resurrected and altered contract, which it did not possess at the time the contract was completed, discharged, and extinguished.

Far more analogous than the decision in the *Mottley* case, *supra,* is the line of authority in this Court holding that retroactive deprivation of existing causes of action is unconstitutional. See, for example, *Ochoa v. Hernandez y Morales,* 230 U. S. 139 (1913) (attempt by military governor retroactively to deprive land-owner of cause of action to recover land held unconstitutional); *Ettor v. Tacoma,* 228 U. S. 148 (1913) (attempt by state to repeal legislation giving cause of action to property owner for damages arising from change of grade in front of property held unconstitutional); and *Forbes Pioneer Boat Line v. Board of Commissioners,* 258 U. S. 338 (1922) (attempt by state retroactively to cut off cause of action for illegally exacted canal tolls held unconstitutional).

The only other cases cited for support by the Court of Appeals for the Sixth Circuit in the *Howell* case relate to tax legislation in some degree retroactive. *Welch v. Henry*, 305 U. S. 134 (1938) and *United States v. Hudson*, 299 U. S. 498 (1937). But retroactive tax legislation constitutes no valid precedent for legislation directed at retroactive change of the terms of completed contracts. Thus, in the *Welch* case, itself, this Court said:

> "* * * Taxation is neither a penalty imposed on the taxpayer *nor a liability which he assumes by contract*. It is but a way of apportioning the cost of government among those who in some measure are privileged to enjoy its benefits and must bear its burdens. Since no citizen enjoys immunity from that burden, its retroactive imposition does not necessarily infringe due process, and to challenge the present tax it is not enough to point out that the taxable event, the receipt of income, antedated the state." (305 U. S. 134, 146)

And even in the tax field, approval of retroactivity has been granted grudgingly and sparingly by this Court. Taxes on transfers made prior to the date of the statute have often been held unconstitutional. *Nichols v. Coolidge*, 274 U. S. 531 (1927) (estate tax); *Blodgett v. Holden*, 275 U. S. 142 (1927) (gift tax); *Untermyer v. Anderson*, 276 U. S. 440 (1928) (gift tax); *Levy v. Wardell*, 258 U. S. 542 (1922) (stock transfer tax). And where retroactivity has been permitted, it has been justified on the theory that the taxpayer should have been forewarned, *Milliken v. United States*, 283 U. S. 15 (1931). In income tax situations it has been limited to income received during the year of the legislative session preceding the enactment of the tax law, *Cooper v. United States*, 280 U. S. 409 (1930); *United States v. Hudson*, 299 U. S. 498 (1937); *Welch v. Henry*, 305 U. S. 134, 150 (1938).

It is not arguable that petitioner in the case at bar was forewarned of renegotiation and the deprivation of its contract profits. Defense Plant Corporation contracts were not covered by the original statute enacted on April 28, 1942 and indeed were not included when the statute was amended on October 21, 1942 to apply to Treasury Department contracts. By July 1, 1943, when the statute was amended to include Defense Plant Corporation, petitioner's contracts had been negotiated, performed, and paid for in full. The transaction was closed.

No authority in this Court's reports countenances retroactive deprivation of property reduced to possession under these or analogous circumstances.

C. Statutory Construction.

Peculiarly ironic is the fact that the lower court's decision on the point of constitutional law was entirely unnecessary in the present case. Neither the July 1, 1943 amendment nor its legislative record indicate a congressional intention to enforce retroactive renegotiation. The constitutional issue decided by the lower court in this case was created solely by the erroneous interpretation given to the statute by the Court of Appeals.

Again and again this Court has made it clear that, even where some degree of retroactivity is constitutionally permissible, congressional intention to make the legislation retroactive must appear from clear, strong and imperative language, *Claridge Apartments Co. v. Commissioner,* 323 U. S. 141, 164 (1944); *United States v. Magnolia Petroleum Co.,* 276 U. S. 160, 162 (1928); *Hassett v. Welch,* 303 U. S. 303, 314 (1938); *Brewster v. Gage,* 280 U. S. 327, 337 (1930); *United States v. St. Louis, San Francisco & Texas Ry. Co.,* 270 U. S. 1 (1926). As the

Court said in *Claridge Apartments Co. v. Commissioner*, 323 U. S. 141, 164:

> "* * * Retroactivity, even where permissible, is not favored, except upon the clearest mandate. It is the normal and usual function of legislation to discriminate between closed transactions and future ones or others pending but not completed. * * *"

This petition is no place in which to elaborate the technical statutory construction arguments relevant to the July 1, 1943 amendment to the Renegotiation Act. It is enough to say that there was nothing in the language or history of the amendment which made the interpretation put upon it by the lower court inevitable. The clear and imperative Congressional intention which this Court has held to be a requisite to retroactive interpretation simply is not shown by the record.

The original Renegotiation Act was carefully limited by its terms to contracts not yet fully paid for at the date of its enactment. There is no valid evidence of a congressional intention to abandon this approach and policy at the time when the statute was amended to grant the renegotiation power to Defense Plant Corporation. If construction is called for, the only reasonable construction is that, like the original statute, the amendment was intended to affect only those contracts which had not been fully paid for at the date of enactment of the amendment.

D. Conclusion.

The constitutional issue in this case has not been decided by this Court. It is an important issue. The lower court has extended the *Lichter* decision far beyond this Court's original intention, has implied that the war powers

of the Congress are without limit in this field, and, by upholding the application of compulsory renegotiation to fully performed contracts, has passed by the only point at which a feasible line might have been drawn between constitutional and unconstitutional retroactivity. Petitioner urges that the situation should not be permitted to go uncorrected by this Court.

But if petitioner's view is wrong, and if private property may be so easily taken or destroyed by legislative fiat, it is for this Court to make the announcement. This basic issue of constitutional law should not be determined by the single opinion of a lower federal court in the *Howell* case, predicated upon a misreading of the decisions of this Court and subsequently followed without re-examination.

And in a more specific sense, decision of this question is important. Renegotiation has become an established national policy[7] and definitive guidance for future congressional action can come only from this Court.

This Court denied certiorari in *Blanchard Machine Co. v. RFC Price Adjustment Board,* 177 F. 2d 727 (1949), *supra,* 339 U. S. 912 (1949). We are, of course, not advised of the reasons for the denial. But those of the issues there involved which are discussed in this petition were presented to the Court in a perspective different from that outlined herein by petitioner. Since the denial of the *Blanchard* petition for certiorari constituted no expression of opinion by this Court on the merits of the issues involved and, since in petitioner's view the constitutional issue presented here is of importance and substance, petitioner seeks review of the decision in the present case.

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[7] See, for example, Renegotiation Acts of 1948, May 21, 1948, c. 333, § 3, 62 Stat. 259; and of 1951, March 23, 1951, C. 15, Tit. II, § 201 (a-d), 63 Stat. 23.

For the reasons stated, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A.

STATUTES INVOLVED.

Original Renegotiation Act of 1942, § 403, Sixth Supplemental National Defense Appropriation Act of 1942, P. L. 528, 77 Cong. 2d Sess. Tit. IV, 56 Stat. 226, 245:

"Sec. 403 (a) For the purposes of this section, the term "Department" means the War Department, the Navy Department, and the Maritime Commission, respectively; in the case of the Maritime Commission, the term "Secretary" means the Chairman of such Commission; and the terms "renegotiate" and "renegotiation" include the refixing by the Secretary of the Department of the contract price. For the purposes of subsections (d) and (e) of this section, the term "contract" includes a subcontract and the term "contractor" includes a subcontractor.

* * * * *

"(c) The Secretary of each Department is authorized and directed, whenever in his opinion excessive profits have been realized, or are likely to be realized, from any contract with such Department or from any subcontract thereunder, (1) to require the contractor or subcontractor to renegotiate the contract price, (2) to withhold from the contractor or subcontractor any amount of the contract price which is found as a result of such renegotiation to represent excessive profits, and (3) in case any amount of the contract price found as a result of such renegotiation to represent excessive profits shall have been paid to the contractor or subcontractor to recover such amount from such contractor or subcontractor. Such contractor or subcontractor shall be deemed to be indebted to the United States for any amount which such Secretary is authorized to recover from such contractor or subcontractor under this subsection, and such Secretary may bring actions in the appropriate courts of the United States to recover such amount on behalf of the

United States. All amount recovered under this subsection shall be covered into the Treasury as miscellaneous receipts. This subsection shall be applicable to all contracts and subcontracts hereafter made and to all contracts and subcontracts heretofore made, whether or not such contracts or subcontracts contain a renegotiation or recapture clause provided that final payment pursuant to such contract or subcontract has not been made prior to the date of enactment of this act."

* * * * *

"(f) The authority and discretion herein conferred upon the Secretary of each Department, in accordance with regulations prescribed by the President for the protection of the interests of the Government, may be delegated, in whole or in part, by him to such individuals or agencies in such Department as he may designate, and he may authorize such individuals or agencies to make further delegations of such authority and discretion."

* * * * *

"(h) This section shall remain in force during the continuance of the present war and for three years after the termination of the war, but no court proceedings brought under this section shall abate by reason of the termination of the provisions of this section."

§ 406:

"Sec. 406. This Act may be cited as the 'Sixth Supplemental National Defense Appropriation Act, 1942.' Approved, April 28, 1942."

Pertinent Amendment to Renegotiation Act contained in Revenue Act of 1942, Tit. VIII, § 801, P. L. 753, 77 Cong., 2d Sess. C. 619, 56 Stat. 798, 982, October 21, 1942:

§ 801(a):

"(a) Subsections (a), (b), and (c) of section 403 of the Sixth Supplemental National Defense Appro-

priation Act (Public 528, 77th Cong., 2d Sess.), are amended to read as follows:

"Sec. 403. (a) For the purposes of this section—

"(1) The term 'Department' means the War Department, the Navy Department, the Treasury Department, and the Maritime Commission, respectively. * * *"

Pertinent Amendment to Renegotiation Act contained in the Military Appropriation Act, 1944, P. L. 108, 78 Cong., 1st. Sess. C. 185, 57 Stat. 347, July 1, 1943:

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the following sums are appropriated, out of any money in the Treasury not otherwise appropriated, for the Military Establishment for the fiscal year ending June 30, 1944, and for other purposes, namely: * * *

"Expediting production of equipment and supplies for national defense: To enable the Secretary of War, without reference to sections 3709 and 1136, as amended, Revised Statutes, to expedite the production of equipment and supplies for the Army for emergency national-defense purposes, including all of the objects and purposes specified under each of the appropriations available to the War Department during the fiscal year 1944, for procurement or production of equipment or supplies, for erection of structures, or for acquisition of land; the furnishing of Government-owned facilities at privately owned plants; the procurement and training of civilian personnel in connection with the production of equipment and material and the use and operation thereof; and for any other purposes which in the discretion of the Secretary of War are desirable in expediting production for military purposes, $657,011,000: *Provided,* That expenditures from any appropriation under this heading may be made without securing the specific approval of the projects by the President:

Provided further, That clauses (1) and (2) of subsection (a) of section 403 of the Sixth Supplemental National Defense Appropriation Act, 1942, as amended, are amended to read as follows:

" 'Sec. 403. (a) For the purposes of this section—

"1. The term 'Department' means the War Department, the Maritime Commission, Defense Plant Corporation, Metals Reserve Company, Defense Supplies Corporation, and Rubber Reserve Company, respectively.

"2. In the case of the Maritime Commission, the term 'Secretary' means the Chairman of such Commission, and in the case of Defense Plant Corporation, Metals Reserve Company, Defense Supplies Corporation, and Rubber Reserve Company, the term 'Secretary' means the board of directors of the appropriate corporation."

"*Provided further,* That section 403 of the Sixth Supplemental National Defense Appropriation Act, 1942, as amended, is further amended by adding at the end thereof the following subsection:

" '(k) All the provisions of this section shall be construed to apply to Defense Plant Corporation, Metal Reserve Company, Defense Supplies Corporation, and Rubber Reserve Company.' "

(p. 370):

"Sec. 22. The appropriations and authority with respect to appropriations contained herein shall be available from and including July 1, 1943, for the purposes respectively provided in such appropriations and authority. All obligations incurred during the period between June 30, 1943, and the date of enactment of this Act in anticipation of such appropriations and authority are hereby ratified and confirmed if in accordance with the terms thereof.

"Sec. 23. This Act may be cited as the 'Military Appropriation Act, 1944.' "

Pertinent Amendments by Revenue Act of 1943, P. L. 235, Tit. VII, Sec. 701; 78th Cong., 2d Sess. C. 63, 58 Stat. 21, February 25, 1944:

(p. 78):

"TITLE VII—RENEGOTIATION OF WAR CONTRACTS.

"SEC. 701. RENEGOTIATION OF WAR CONTRACTS.

* * *

"(b) Renegotiation of War Contracts.—Section 403, as amended, of the Sixth Supplemental National Defense Appropriation Act, 1942, is amended to read as follows:

(p. 82):

"Sec. *403.* (a) * * *

"(c) (1). Whenever, in the opinion of the Board, the amounts received or accrued under contracts with the Departments and subcontracts may reflect excessive profits, the Board shall give to the contractor or subcontractor, as the case may be, reasonable notice of the time and place of a conference to be held with respect thereto. The mailing of such notice by registered mail to the contractor or subcontractor shall constitute the commencement of the renegotiation proceeding. * * * If the Board does not make an agreement with respect to the elimination of excessive profits received or accrued, it shall issue and enter an order determining the amount, if any, of such excessive profits, and forthwith give notice thereof, by registered mail to the contractor or subcontractor. In the absence of the filing of a petition with The Tax Court of the United States under the provisions of and within the time limit prescribed in subsection (e) (1), such order shall be final and conclusive and shall not be subject to review or redetermination by any court or other agency. * * *"

(p. 85):

"(6) This subsection shall be applicable to all contracts and subcontracts, to the extent of amounts

received or accrued thereunder in any fiscal year ending after June 30, 1943, whether such contracts or subcontracts were made on, prior to, or after the date of the enactment of the Revenue Act of 1943, and whether or not such contracts or subcontracts contain the provisions required under subsection (b), unless (A) the contract or subcontract provides otherwise pursuant to subsection (i), or is exempted under subsection (i), or (B) the aggregate of the amounts received or accrued in such fiscal year by the contractor or subcontractor and all persons under the control of or controlling or under common control with the contractor or subcontractor, under contracts with the Departments and subcontracts (including those described in clause (A), but excluding subcontracts described in subsection (a) (5) (B)) do not exceed $500,000 and under subcontracts described in subsection (a) (5) (B) do not exceed $25,000 for such fiscal year. If such fiscal year is a fractional part of twelve months, the $500,000 amount and the $25,000 amount shall be reduced to the same fractional part thereof for the purposes of this paragraph.

"(d) (1) There is hereby created a War Contracts Price Adjustment Board (in this section called the 'Board'), which shall consist of six members. One of the members shall be an officer or employee of the Department of War and shall be appointed by the Secretary of War, one shall be an officer or employee of the Department of the Navy and shall be appointed by the Secretary of the Navy, one shall be an officer or employee of the Department of the Treasury and shall be appointed by the Secretary of the Treasury, one shall be an officer or employee of the United States Maritime Commission or the War Shipping Administration and shall be appointed jointly by the Chairman of the United States Maritime Commission and the Administrator of the War Shipping Administration, one shall be an officer or employee of the Reconstruction Finance Corporation and shall be appointed by

the Chairman of the board of directors of the Reconstruction Finance Corporation, and one shall be an officer or employee of the War Production Board and shall be appointed by the Chairman of the War Production Board. * * *"

(p. 86):

"(4) The Board may delegate in whole or in part any power, function, or duty to the Secretary of a Department, and any power, function, or duty so delegated may be delegated in whole or in part by the Secretary to such officers or agencies of the United States as he may designate, and he may authorize successive redelegations of such powers, functions, and duties.

"(5) The chairman of the Board may from time to time divide the Board into divisions of one or more members, assign the members of the Board thereto, and in case of a division of more than one member, designate the chief thereof. The Board may also, by regulations or otherwise, determine the character of cases to be conducted initially by the Board through an officer or officers of, or utilized by, the Board, the character of cases to be conducted initially by the various officers and agencies authorized to exercise powers of the Board pursuant to paragraph (4), the character of cases to be conducted initially by the various divisions of the Board, and the character of cases to be conducted initially by the Board itself. The Board may review any determination by any such officer, agency, or division on its own motion, or in its discretion at the request of any contractor or subcontractor aggrieved thereby. Unless the Board upon its own motion initiates a view of such determination within 60 days from the date of such determination, or at the request of the contractor or subcontractor made within 60 days from the date of such determination initiates a review of such determination within 60 days from the date of such request, such determina-

tion shall be deemed the determination of the Board. Upon any review by the Board the Board may determine as the amount of excessive profits an amount either less than, equal to, or greater than that determined by the officer, agency or division whose action is so reviewed.

(e) (1) Any contractor or subcontractor aggrieved by an order of the Board determining the amount of excessive profits received or accrued by such contractor or subcontractor may, within ninety days (not counting Sunday or a legal holiday in the District of Columbia as the last day) after the mailing of the notice of such order under subsection (c) (1), file a petition with The Tax Court of the United States for a redetermination thereof. Upon such filing such court shall have exclusive jurisdiction, by order, to finally determine the amount, if any, of such excessive profits received or accrued by the contractor or subcontractor, and such determination shall not be reviewed or redetermined by any court or agency. The court may determine as the amount of excessive profits an amount either less than, equal to, or greater than that determined by the Board. A proceeding before the Tax Court to finally determine the amount, if any, of excessive profits shall not be treated as a proceeding to review the determination of the Board, but shall be treated as a proceeding de novo. * * *"

(p. 87):

"(e) (2) Any contractor or subcontractor (excluding a subcontractor described in subsection (a) (5) (B)) aggrieved by a determination of the Secretary made prior to the date of the enactment of the Revenue Act of 1943, with respect to a fiscal year ending before July 1, 1943, as to the existence of excessive profits, which is not embodied in an agreement with the contractor or subcontractor, may, within ninety days (not counting Sunday or a legal holiday in the District of Columbia as the last day) after the

date of the enactment of the Revenue Act of 1943, file a petition with The Tax Court of the United States for a redetermination thereof, and any such contractor or subcontractor aggrieved by a determination of the Secretary made on or after the date of the enactment of the Revenue Act of 1943, with respect to any such fiscal year, as to the existence of excessive profits, which is not embodied in an agreement with the contractor or subcontractor, may, within ninety days (not counting Sunday or a legal holiday in the District of Columbia as the last day) after the date of such determination, file a petition with The Tax Court of the United States for a redetermination thereof. Upon such filing such court shall have the same jurisdiction, powers, and duties, and the proceeding shall be subject to the same provisions, as in the case of a petition filed with the court under paragraph (1), except that the amendments made to this section by the Revenue Act of 1943 which are not made applicable as of April 28, 1942, or to fiscal years ending before July 1, 1943, shall not apply."

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In the Supreme Court of the United States

OCTOBER TERM, 1952

No. 588

THE WARNER & SWASEY COMPANY, *Petitioner*

v.

WAR CONTRACTS PRICE ADJUSTMENT BOARD, and MAURICE HIRSCH, EDWIN H. BARKLEY, JOHN R. PAULL, H. C. MAULL, JR., GEORGE P. LUCE and NORMAN L. BURTON, Members Thereof, and the UNITED STATES and RECONSTRUCTION FINANCE CORPORATION

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The memorandum opinion of the Tax Court (R. 244-248) is unreported. The opinion of the Court of Appeals for the District of Columbia Circuit (R. 271-273) is not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered on November 20, 1952 (R. 274). The petition for a writ of certiorari was filed on February 5, 1953. The jurisdiction of this Court is invoked under 28 U.S.C. 1254.

QUESTIONS PRESENTED

1. Whether the July 1, 1943, amendment of the Renegotiation Act, which authorized renegotiation of contracts and subcontracts with the Defense Plant Corporation and provided that "all the provisions" of the existing renegotiation legislation should be applicable, subjected to renegotiation Defense Plant Corporation contracts and subcontracts which were completed and paid for after April 28, 1942, the date of the First Renegotiation Act, but prior to July 1, 1943.

2. Whether the July 1, 1943 amendment, as so applied, is constitutional.

STATUTES INVOLVED

The provisions of the First Renegotiation Act (Sec. 403 of the Sixth Supplemental National Defense Appropriation Act, 1942, Act of April 28, 1942, Title IV, 56 Stat. 226, 245), as amended by the Revenue Act of 1942 (Act of October 21, 1942, Title VIII, 56 Stat. 798, 982) and the Military Appropriation Act of 1944 (Act of July 1, 1943, 57 Stat. 347), are set forth in pertinent part in the Appendix, *infra,* pp. 16-24.

STATEMENT

These proceedings challenge the applicability of the July 1, 1943, amendment of the Renegotiation Act to petitioner's Defense Plant Corporation contracts and subcontracts which were completed and paid for after April 28, 1942, the date of the First Renegotiation Act, but prior to July 1, 1943. The uncontroverted facts are as follows:

On May 28, 1946, the War Contracts Price Adjustment Board unilaterally determined that petitioner's excess profits on contracts and subcontracts with the Defense Plant Corporation with respect to its fiscal year ending December 31, 1943, amounted to $6,500,000. (R. 47-48, 92.) On August 26, 1946, the Reconstruction Finance Corporation Price Adjustment Board unilaterally determined that petitioner's excessive profits on contracts and subcontracts with the Defense Plant Corporation with respect to its fiscal year ending December 31, 1942, amounted to $5,497,833. (R. 69-72, 96.)

On August 14, 1946 (R. 9) and on November 21, 1946 (R. 49), petitioner filed petitions in the Tax Court of the United States for a redetermination of these unilateral determinations. These petitions attacked the determinations as erroneous and challenged the constitutionality of the Renegotiation Act (R. 12-16, 52-55).

On July 28, 1949, subsequent to the decision of this Court in *Lichter* v. *United States,* 334 U. S. 742, the parties entered into stipulations wherein

it was agreed as follows (R. 91-94, 95-98): With respect to petitioner's 1942 fiscal year, it was stipulated that if the Renegotiation Act is applicable to and constitutionally subjects to renegotiation all of petitioner's Defense Plant Corporation contracts and subcontracts which were completed and paid for after April 27, 1942, but prior to July 1, 1943, the agreed amount of excessive profits is $5,836,450.87 (before application of the tax credit pursuant to Section 3806 of the Internal Revenue Code). It was further stipulated that if the Act is not thus applicable, the agreed amount of excessive profits is $76,697.35 (R. 97). With respect to petitioner's 1943 fiscal year, it was similarly stipulated that the agreed amount of excessive profits is $6,836,471.86, if the Act is retroactive and constitutional and, if not, $4,201,008.82 (R. 92-93).

On August 9, 1949, pursuant to a joint motion and stipulation of the parties, the proceedings were placed on the reserve calendar of the Tax Court under Rule 27(d) of the Rules of Practice of that court pending decision of the Court of Appeals for the District of Columbia Circuit (the court below) in *Blanchard Machine Co.* v. *Reconstruction Finance Corporation* (R. 93, 98, 107). In the decision of the latter case, that court held that the Renegotiation Act, as amended, was constitutionally applicable to Defense Plant Corporation contracts fully performed prior to July 1, 1943. 177 F. 2d 727, certiorari denied, 339 U. S. 912. Following the reconsideration and approval of

that construction of the Renegotiation Act by the court below in *Eastern Machinery Co.* v. *Under Secretary of War,* 182 F. 2d 99, the proceedings were removed from the reserve calendar on December 6, 1950 (R. 125), and were heard by the Tax Court on June 28, 1951 (R. 214).

On the authority of these cases, *Lichter* v. *United States,* 334 U. S. 742, and *Lincoln Electric Co.* v. *Forrestal,* 334 U. S. 841, the Tax Court held that the "Renegotiation Act of 1942, as amended July 1, 1943, applies to and subjects to renegotiation Defense Plant Corporation contracts and subcontracts fully performed prior to July 1, 1943, and that as so construed the act is not unconstitutional." (R. 247-248.) In accordance with the stipulations, the Tax Court found that petitioner's excessive profits were $5,836,450.87 in 1942 and $6,836,471.86 in 1943 (R. 248, 249). The court below affirmed, stating that "we are not persuaded to reexamine these questions, twice decided by us" (R. 273).

ARGUMENT

In accord with its earlier decisions in *Blanchard Machine Co.* v. *Reconstruction Finance Corporation,* 177 F. 2d 729, certiorari denied, 339 U. S. 912, and *Eastern Machinery Co.* v. *Under Secretary of War,* 182 F. 2d 99, and with the decision of the Court of Appeals for the Sixth Circuit in *Howell Electric Motors Co.* v. *United States,* 172 F. 2d 953, the court below has held that the July 1, 1943 amendment of the Renegotiation Act is applicable,

as a matter of statutory construction, to Defense Plant Corporation contracts and subcontracts completed and fully paid for between April 28, 1942, and July 1, 1943, and that the amendment is constitutional as so construed. Petitioner advances substantially the same arguments which were presented to this Court in the *Blanchard* case. The considerations which led to the denial of certiorari in that case are equally applicable here and further review is not warranted.

1. Contrary to petitioner's suggestion (Pet. 15-16), it is plain on the face of the July 1, 1943, amendment (*infra*, p. 23) that it was designed to apply retroactively to DPC contracts completed and fully paid for after April 28, 1942, but prior to the date of the amendment. The purpose of the new subsection (k), added by that amendment, was to make applicable to DPC and the other named RFC subsidiaries "all the provisions" of the existing Renegotiation Act, one of which (Section 403(c)(6), as amended by the Act of October 21, 1942) provided, *inter alia*, that the Act—

> * * * shall be applicable to all contracts and subcontracts hereafter made and to all contracts and subcontracts heretofore made * * * unless (i) final payment pursuant to such contract or subcontract was made prior to April 28, 1942 * * * [*infra*, p. 22].

To construe subsection (k) not to operate to make the July 1, 1943 amendment retroactive to

April 28, 1942 would be to disregard completely the phrase "all the provisions." Indeed, it would result in making subsection (k) redundant. If Congress had intended the amendment to apply only to those DPC contracts which were still executory on July 1, 1943, and not to those agreements on which final payment had been made prior thereto but since April 28, 1942, it might have accomplished this purpose by merely amending Section 403(a) (see Appendix, *infra,* p. 16) to include the various RFC subsidiaries in the definition of "Secretaries." *United States* v. *Howell Electric Motors Co.,* 78 F. Supp. 627, 630 (E.D. Mich.), affirmed, 172 F. 2d 953 (C.A. 6); *National Electric Welding Machines Co.* v. *Stimson,* 10 T. C. 49, 56-58.

In addition, the legislative history of subsection (k) shows that it was included for the precise purpose of making the July 1, 1943, amendment retroactive to April 28, 1942. The Military Establishment Appropriation Bill for 1944, as it passed the House, authorizing renegotiation by the RFC subsidiaries, did not contain the critical subsection (k). Subsection (k) appeared for the first time after conference between the two Houses of Congress.[1] The inclusion of that subsection was a di-

[1] The amendment authorizing renegotiation by RFC subsidiaries, without subsection (k), was offered on the House floor by Representative Case; it was agreed to and passed by the House without explanation or discussion. 89 Cong. Rec. 6176. The Senate Appropriations Committee, however, deleted the entire House amendment, indicating that it "did

rect consequence of a letter dated June 24, 1943, from John D. Goodloe, RFC General Counsel, to Senator Elmer Thomas, Chairman of the War Department Subcommittee of the Senate Appropriations Committee which considered the House bill. That letter proposed that subsection (k) be incorporated, "if the Congress selects the date, April 28, 1942, as contained in the present statute," as fixing the date as to which "the statute is to apply to uncompleted contracts of subsidiaries of the Reconstruction Finance Corporation."[2] According to testimony of Senator Thomas, who was also chairman of the Senate conferees and of the joint conference committee, he received the Goodloe letter after the bill had been sent to conference; he read the entire letter to the conference committee, which agreed that the subsection (k) language, as suggested in the letter, should be used; and he subsequently clipped the agreed portions from the letter and personally prepared the amendment in the ex-

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not have time to go into the subject" (89 Cong. Rec. 6581; S. Rep. No. 357, 78th Cong., 1st Sess., p. 7), and the bill passed the Senate without any provision dealing with renegotiation. 89 Cong. Rec. 6587. In conference, the substance of the House amendment was reinstated and subsection (k) was added. H. Rep. No. 620, 78th Cong., 1st Sess., pp. 1-2; 89 Cong. Rec. 6828-9.

[2] The letter also proposed an alternative clause if Congress should desire to make the amendment prospective only. The full text of the Goodloe letter appears in Hearings before the Committee on Ways and Means, House of Representatives, 78th Cong., 1st Sess., on H. R. 2324, H. R. 2698, and H. R. 3015 (Sept. 1943), pp. 200-201.

act form in which it was enacted (R. 174-180).[3] This material plainly establishes that Congress, in adopting Mr. Goodloe's suggested language for subsection (k), understood and agreed with his statement that that subsection made the amendment retroactive to April 28, 1942.

Moreover, in testifying before the Ways and Means Committee of the House of Representatives, shortly after the amendment of July 1, 1943, Chairman Jones of the RFC stated:[4]

> The amendment suggested for use [by Mr. Goodloe] in the event the Congress wished to make subject to renegotiation the RFC subsidiary contracts under which final payment had not been made prior to April 28, 1942, was added in conference on the Military Appropriations Act of 1944. I call attention to this particularly since it seems to me to clearly evi-

[3] Consideration of this material, although not embodied in an official report, is permissible since Senator Thomas did not give his opinion of the meaning of the statute but showed how the precise question now in question was considered by the appropriate legislative committee. See *United States* v. *Dickerson*, 310 U. S. 554, 562; *United States* v. *American Trucking Ass'ns.*, 310 U. S. 534, 544. The district court, in *United States* v. *Howell Electric Motors Co.*, 78 F. Supp. 627 (E. D. Mich.), affirmed, 172 F. 2d 953 (C. A. 6), accepted affidavits of Senator Thomas and Mr. Goodloe, to the same effect as their testimony incorporated in the record here as "competent corroboratory testimony," although it held the testimony unnecessary since the meaning of the July 1, 1943, amendment was sufficiently clear on its face. 78 F. Supp. at 630-631.

[4] See Hearings, *supra*, fn. 2, p. 187.

dence the intention of the Congress that the amendment was to be retroactive in its application to the contracts of the four RFC subsidiaries.

Although this administrative construction was thus specifically called to the attention of the Committee then dealing with over-all revision of the Renegotiation Act, there was, and has been, no suggestion of congressional disapproval. The Second Renegotiation Act (Revenue Act of 1943, Title VII, Act of February 25, 1944, 58 Stat. 21, 78-93), which eventuated from the studies of the Ways and Means Committee, did not seek to change the administrative interpretation that the July 1, 1943 amendment was retroactive. In these circumstances, it is indisputably plain that subsection (k) was designed by Congress to make the July 1, 1943 amendment retroactive to business done since April 28, 1942.

2. Petitioner's attack on the constitutionality of the application of the July 1, 1943, amendment to contracts and subcontracts completed and fully paid for prior to July 1, 1943, does not, contrary to petitioner, arise in this Court as an original question. This contention has already been determined in favor of the Act's validity in *Lincoln Electric Co.* v. *Forrestal,* 334 U. S. 841, decided *per curiam* on the same day as, and on the authority of, *Lichter* v. *United States,* 334 U. S. 742. Throughout the *Lincoln Electric*

litigation, the contractor claimed that the Secretary of the Navy improperly included sales in the calendar year 1942 to DPC and its contractors and subcontractors in the contractor's renegotiable business, upon which the Secretary's unilateral order there involved was based. The contractor specifically contended that if the July 1, 1943, amendment did so apply, it was invalid. Inasmuch as this Court, unlike the district court (77 F. Supp. 444, 447), decided the merits of the controversy, it necessarily determined the constitutional issues raised in regard to the July 1, 1943, amendment.

Moreover, apart from *Lincoln Electric*, petitioner's claim has no merit. The *Lichter* case has authoritatively sustained the constitutionality of the Renegotiation Act as applied retroactively to subcontracts entered into before the passage of the original statute (on April 28, 1942), but upon which final payment had not been made. 334 U. S. at 788-789. Further, *Alexander Wool Combing Co.* v. *United States* (decided together with *Lichter*, 334 U. S. 742), held that certain subcontracts entered into between April 28, 1942, and October 21, 1942, could validly be renegotiated under the amendment of October 21, 1942, although the original Act might not have subjected these agreements to renegotiation. 334 U. S. at 789.

Petitioner attempts to distinguish the *Lichter* case on the ground that petitioner's contracts and subcontracts were not executory but had

been fully performed and paid for prior to the enactment of the July 1, 1943, amendment, and had become vested property rights. But "the mere circumstance that the contractor here has received full remuneration on the transactions involved is a distinction without substance." *Howell Electric Motors Co.* v. *United States,* 172 F. 2d 953, 954 (C.A. 6). For this Court, in sanctioning retroactive statutes reducing contract rights—where there is a reasonable basis and a good cause for such diminution—has not rationalized the cutting-off of accrued contract rights on the ground that such rights differ from property; on the contrary, this Court has upheld such legislation despite its acceptance of such contract interests as property rights. *Calhoun* v. *Massie,* 253 U. S. 170, 176; *Norman* v. *Baltimore & Ohio R. Co.,* 294 U. S. 240, 307-308, 309, 310; *Louisville & Nashville R. R.* v. *Mottley,* 219 U. S. 467; *Philadelphia, B. & W. R. Co.* v. *Schubert,* 224 U. S. 603; *Wright* v. *Union Central Insurance Co.,* 304 U. S. 502, 515-516; *Block* v. *Hirsh,* 256 U. S. 135; *Bowles* v. *Willingham,* 321 U. S. 503. Indeed, where Federal action is concerned, contract rights are accorded constitutional protection only insofar as they are deemed property rights, since the Impairment of Contracts Clause governs state action alone. Cf. *Calhoun* v. *Massie,* 253 U. S. 170, 174-176. And as Mr. Justice Brandeis said in the *Calhoun* case, "the United States may, consistently with the Fifth Amendment, impose for a per-

mitted purpose, restrictions upon property which produce" a "serious depreciation of property values." 253 U. S. at 175.[5]

That there was a reasonable basis for making the July 1, 1943, amendment retrospective to April 28, 1942, is easily demonstrable. By the original Renegotiation Act Congress undertook to recapture excessive profits from holders of contracts and subcontracts with the named government agencies. When Congress discovered that contractors with subcontracts and contracts with the Defense Plant Corporation, an important war agency, were realizing excessive profits not clearly subject to recapture, it undertook to make clear that it intended to apply its general policy to all DPC sales made since the date the general policy was declared. This was a reasonable course of action, both from the standpoint of protecting the public treasury and also as a measure of equalization among war

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[5] An especially forceful analogy to the recovery by renegotiation of net profits realized under executed contracts is retroactive income taxation, which has long been held valid. *Spaulding* v. *Douglas Aircraft Co., Inc.*, 154 F. 2d 419, 423 (C.A. 9). See *e.g., Welch* v. *Henry*, 305 U. S. 134, 150; *United States* v. *Hudson*, 299 U. S. 498; *Cooper* v. *United States*, 280 U. S. 409, 411. The cases in which certain retrospective gift taxation had been invalidated (*Nichols* v. *Coolidge*, 274 U. S. 531; *Blodgett* v. *Holden*, 275 U. S. 142; *Untermyer* v. *Anderson*, 276 U. S. 440) (relied on by petitioner, Pet. 14) were distinguished in *Welch* v. *Henry, supra*, on the ground that in those cases the donors might have refrained from making the gifts had they known of or anticipated the gift tax, but it could not be said that the taxpayer would have been deterred from receiving income by knowledge that it might thereafter be taxed (305 U. S. at 147-148).

contractors. In these circumstances, the reduction in the value of contractors' rights to the full payments made before July 1, 1943, no more invalidates the July 1, 1943, amendment than did the reduction in the value of the accrued rights—to payments made as well as money owed—of the contractors originally made subject to renegotiation on April 28, 1942. The effective period of retroactivity in this case—at most a year and one quarter—does not exceed that often applicable under the original Act,[6] or under the rent-control, gold-clause, mortgage-moratorium or deficiency-judgment statutes, already sanctioned by this Court. See *e.g., Bowles* v. *Willingham,* 321 U. S. 503; *Norman* v. *Baltimore & Ohio R. Co.,* 294 U. S. 240; *Home Building & Loan Association* v. *Blaisdell,* 290 U. S. 398; *Gelfert* v. *National City Bank,* 313 U. S. 221.

Moreover, in view of the controversy which took place as to whether the DPC contracts were covered by the original Act,[7] the express extension of the Act to such DPC business could hardly take DPC's contractors or subcontractors by surprise.

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[6] For example, many naval ship-construction contracts executed before March of 1941 were still in existence on April 28, 1942, and therefore subject to renegotiation.

[7] Although the RFC did not itself believe that its subsidiaries' contracts were negotiable under the First Renegotiation Act, other Government officials took a contrary view (R. 189-192, 196-199). See "Joint Statement by the War, Navy and Treasury Departments and Maritime Commission," dated March 31, 1943, p. 12.

In the view most favorable to petitioner, the July 1, 1943, amendment merely extended the reach of legislative control on a subject matter, excessive war profits, which had been the subject of prior regulation; and when petitioner made DPC sales in 1942 and 1943, it made them "subject to further legislation upon the same topic." *Veix* v. *Sixth Ward Ass'n*, 310 U. S. 32, 38. Such retroactivity hardly constitutes an unreasonable or arbitrary, or even an unanticipated, interference with petitioner's expectations. Cf. *United States* v. *Hudson*, 299 U. S. 498, 501; *Milliken* v. *United States*, 283 U. S. 15, 22-24; see also *Illinois Central R. R. Co.* v. *Minnesota*, 309 U. S. 157, 164-5.

CONCLUSION

The judgment of the court below is clearly correct and there is no conflict of decisions. It is respectfully submitted that the petition for a writ of certiorari should be denied.

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MARCH, 1953.

APPENDIX

1. The First Renegotiation Act (Sec. 403 of the Sixth Supplemental National Defense Appropriation Act, 1942, Act of April 28, 1942, Title IV, 56 Stat. 226, 245) provides:

> SEC. 403. (a) For the purposes of this section, the term "Department" means the War Department, the Navy Department, and the Maritime Commission, respectively; in the case of the Maritime Commission, the term "Secretary" means the Chairman of such Commission; and the terms "renegotiate" and "renegotiation" include the refixing by the Secretary of the Department of the contract price. For the purposes of subsections (d) and (e) of this section, the term "contract" includes a subcontract and the term "contractor" includes a subcontractor.
>
> (b) The Secretary of each Department is authorized and directed to insert in any contract for an amount in excess of $100,000 hereafter made by such Department (1) a provision for the renegotiation of the contract price at a period or periods when, in the judgment of the Secretary, the profits can be determined with reasonable certainty; (2) a provision for the retention by the United States or the repayment to the United States of (A) any amount of the contract price which is found as a result of such renegotiation to represent ex-

cessive profits and (B) an amount of the contract price equal to the amount of the reduction in the contract price of any subcontract under such contract pursuant to the renegotiation of such subcontract as provided in clause (3) of this subsection; and (3) a provision requiring the contractor to insert in each subcontract for an amount in excess of $100,000 made by him under such contract (A) a provision for the renegotiation by such Secretary and the subcontractor of the contract price of the subcontract at a period or periods when, in the judgment of the Secretary, the profits can be determined with reasonable certainty, (B) a provision for the retention by the United States or the repayment to the United States of any amount of the contract price of the subcontract which is found as a result of such renegotiation, to represent excessive profits, and (C) a provision for relieving the contractor from any liability to the subcontractor on account of any amount so retained by or repaid to the United States.

(c) The Secretary of each Department is authorized and directed, whenever in his opinion excessive profits have been realized, or are likely to be realized, from any contract with such Department or from any subcontract thereunder, (1) to require the contractor or subcontractor to renegotiate the contract price, (2) to withhold from the contractor or

subcontractor any amount of the contract price which is found as a result of such renegotiation to represent excessive profits, and (3) in case any amount of the contract price found as a result of such renegotiation to represent excessive profits shall have been paid to the contractor or subcontractor, to recover such amount from such contractor or subcontractor. Such contractor or subcontractor shall be deemed to be indebted to the United States for any amount which such Secretary is authorized to recover from such contractor or subcontractor under this subsection, and such Secretary may bring actions in the appropriate courts of the United States to recover such amount on behalf of the United States. All amounts recovered under this subsection shall be covered into the Treasury as miscellaneous receipts. This subsection shall be applicable to all contracts and subcontracts hereafter made and to all contracts and subcontracts heretofore made, whether or not such contracts or subcontracts contain a renegotiation or recapture clause, provided that final payment pursuant to such contract or subcontract has not been made prior to the date of enactment of this Act.

(d) In renegotiating a contract price or determining excessive profits for the purposes of this section, the Secretaries of the respective Departments shall not make any allowance for any salaries, bonuses, or other com-

pensation paid by a contractor to its officers or employees in excess of a reasonable amount, nor shall they make allowance for any excessive reserves set up by the contractor or for any costs incurred by the contractor which are excessive and unreasonable. For the purpose of ascertaining whether such unreasonable compensation has been or is being paid, or whether such excessive reserves have been or are being set up, or whether any excessive and unreasonable costs have been or are being incurred, each such Secretary shall have the same powers with respect to any such contractor that an agency designated by the President to exercise the powers conferred by title XIII of the Second War Powers Act, 1942, has with respect to any contractor to whom such title is applicable. In the interest of economy and the avoidance of duplication of inspection and audit, the services of the Bureau of Internal Revenue shall, upon request of each such Secretary and the approval of the Secretary of the Treasury, be made available to the extent determined by the Secretary of the Treasury for the purposes of making examinations and determinations with respect to profits under this section.

(e) In addition to the powers conferred by existing law, the Secretary of each Department shall have the right to demand of any

contractor who holds contracts with respect to which the provisions of this section are applicable in an aggregate amount in excess of $100,000, statements of actual costs of production and such other financial statements, at such times and in such form and detail, as such Secretary may require. Any person who willfully fails or refuses to furnish any statement required of him under this subsection, or who knowingly furnishes any such statement containing information which is false or misleading in any material respect, shall, upon conviction thereof, be punished by a fine of not more than $10,000 or imprisonment for not more than two years, or both. The powers conferred by this subsection shall be exercised in the case of any contractor by the Secretary of the Department holding the largest amount of such contracts with such contractor, or by such Secretary as may be mutually agreed to by the Secretaries concerned.

(f) The authority and discretion herein conferred upon the Secretary of each Department, in accordance with regulations prescribed by the President for the protection of the interests of the Government, may be delegated, in whole or in part, by him to such individuals or agencies in such Department as he may designate, and he may authorize such individuals or agencies to make further delegations of such authority and discretion.

(g) If any provision of this section or the application thereof to any person or circumstance is held invalid, the remainder of the section and the application of such provision to other persons or circumstances shall not be affected thereby.

(h) This section shall remain in force during the continuance of the present war and for three years after the termination of the war, but no court proceedings brought under this section shall abate by reason of the termination of the provisions of this section.

2. The Revenue Act of 1942 (Act of October 21, 1942, Title VIII, 56 Stat. 798, 982) provides in pertinent part as follows:

Sec. 801. RENEGOTIATION OF WAR CONTRACTS.

(a) Subsections (a), (b), and (c) of section 403 of the Sixth Supplemental National Defense Appropriation Act (Public 528, 77th Cong., 2d Sess.), are amended to read as follows:

Sec. 403. (a) For the purposes of this section—

(1) The term "Department" means the War Department, the Navy Department, the Treasury Department, and the Maritime Commission, respectively.

(2) In the case of the Maritime Commission, the term "Secretary" means the Chairman of such Commission.

* * * * *

(c) * * * (6) This subsection (c) shall be applicable to all contracts and subcontracts hereafter made and to all contracts and subcontracts heretofore made, whether or not such contracts or subcontracts contain a renegotiation or recapture clause, unless (i) final payment pursuant to such contract or subcontract was made prior to April 28, 1942, or (ii) the contract or subcontract provides otherwise pursuant to subsection (b) or (i), or is exempted under subsection (i), of this section 403, or (iii) the aggregate sales by the contractor or subcontractor, and by all persons under the control of or controlling or under common control with the contractor or subcontractor, under contracts with the Departments and subcontracts thereunder do not exceed, or in the opinion of the Secretary concerned will not exceed, $100,000 for the fiscal year of such contractor or subcontractor.

No renegotiation of the contract price pursuant to any provision therefor, or otherwise, shall be commenced by the Secretary more than one year after the close of the fiscal year of the contractor or subcontractor within which completion or termination of the con-

tract or subcontract, as determined by the Secretary, occurs.

3. The Military Appropriation Act of 1944 (Act of July 1, 1943, 57 Stat. 347) provides in pertinent part as follows:

* * * *Provided further,* That clauses (1) and (2) of subsection (a) of section 403 of the Sixth Supplemental National Defense Appropriation Act, 1942, as amended, are amended to read as follows:

Sec. 403. (a) For the purposes of this section—

1. The term "Department" means the War Department, the Navy Department, the Treasury Department, the Maritime Commission, Defense Plant Corporation, Metals Reserve Company, Defense Supplies Corporation, and Rubber Reserve Company, respectively.

2. In the case of the Maritime Commission, the term "Secretary" means the Chairman of such Commission, and in the case of Defense Plant Corporation, Metals Reserve Company, Defense Supplies Corporation, and Rubber Reserve Company, the term "Secretary" means the board of directors of the appropriate corporation.

Provided further, That section 403 of the Sixth Supplemental National Defense Appropriation Act, 1942, as amended, is further amended by adding at the end thereof the following subsection:

(k) All the provisions of this section shall be construed to apply to Defense Plant Corporation, Metals Reserve Company, Defense Supplies Corporation, and Rubber Reserve Company.

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In the Supreme Court of the United States

OCTOBER TERM, 1952.

No. 588.

Supreme Court, U.S.
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Petitioner,

v.

WAR CONTRACTS PRICE ADJUSTMENT BOARD, and MAURICE HIRSCH, EDWIN H. BARKLEY, JOHN R. PAULL, H. C. MAULL, JR., GEORGE P. LUCE and NORMAN L. BURTON, Members Thereof, and the UNITED STATES

and

RECONSTRUCTION FINANCE CORPORATION,
Respondents.

REPLY BRIEF OF PETITIONER.

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Respondents' brief in this proceeding requires comment.

1. One would gather to read Respondents' brief that the constitutional issue presented here has already been decided by this Court. This is Respondents' first main argument. It is unfounded.

Three cases are cited. Of these, *Lincoln Electric Co. v. Forrestal,* 334 U. S. 841 (1948), was no more than a one-sentence per curiam decision of this Court affirming a procedural decision of the District Court that the United States was not a defendant in the action and that a federal contractor who had failed to pursue his administrative remedy was not entitled to maintain the action. 77 F. Supp. 444 (D. D. C. 1944). As for *Alexander Wool Combing Co. v. United States* (decided together with

Lichter v. United States, 334 U. S. 742 (1948)), it did not concern contracts entered into before the enactment of the original Renegotiation Act. As the Court remarked at page 788, all contracts involved in the litigation, with the exception of four in the *Lichter* case, were entered into after the date of enactment of the original Renegotiation Act and on those four, final payment had not been made by that date. Finally, Respondents cite *Blanchard Machine Co. v. Reconstruction Finance Corporation, Price Adjustment Board*, 177 F. 2d 727 (D. C. Cir. 1949), in which case this Court denied certiorari. 339 U. S. 912 (1950). It should no longer be necessary to cite authority for the proposition that denial of certiorari imports no viewpoint on the merits.

The important constitutional question presented by this petition has not been decided by this Court.

2. Respondents' second major argument is that there is no room for doubt or construction as to the retroactivity of the statute. Whether Respondents themselves are entirely convinced of the inevitability of this reading of the statute is thrown into some doubt by the excursion which they feel called upon to make into the field of obscure legislative history. A petition for certiorari, and most particularly a reply brief on a petition for certiorari, is no place in which to engage in debate on the intricacies of legislative history. Some measure of Respondents' strength on this issue, however, may be given by the fact that their legislative history citations are drawn from (i) testimony before a committee, not included in a committee report and never called to the attention of the Congress, and (ii) statements of administrative officials made subsequent to the enactment of the statute by Congress.

As indicated in Petitioner's brief-in-chief, the language contained in the July 1, 1943 amendment is hardly

self-executory. And certainly it does not command retroactivity with the tone of authority or the specificity required by this Court's decisions to sustain retrospective application of legislation.

3. Finally, Respondents advance arguments why Congress might have desired to enact a retroactive renegotiation act. If the statute is so read, these are exactly the reasons which should be weighed by this Court against the considerations advanced by Petitioner and against the great burden of demonstration which proponents of retroactive legislation must always be prepared to assume. Contrary to the impression which Respondents attempt to create in their brief, Petitioner has not sought to press its case here on a mechanical theory of vested rights and inviolable privilege immune from adjustment with the competing demands of society. Petitioner agrees with Respondents that narrowly defined areas of retroactivity are permissible where the totality of the considerations in the particular instance require.

Whether the considerations advanced by Respondents require extension of these limits of permissible retroactivity is the very problem presented to the Court by this petition. Its importance justifies its decision.

CONCLUSION.

For the reasons advanced in the petition and in this reply brief, it is respectfully submitted that the petition for a writ of certiorari in this proceeding should be granted.

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